Filed 11/16/09 P. v. Willis CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES WILLIS, Defendant and Appellant.	C060343 (Super. Ct. No. 07F00088)

A jury found defendant James Willis guilty of special-circumstance murder, second degree robbery, and being a felon in possession of a firearm and found he personally and intentionally discharged a firearm during commission of the robbery and murder. The trial court sentenced defendant to 25 years to life in prison plus life without the possibility of parole.

On appeal, defendant contends: (1) the trial court erred by admitting evidence of defendant's threats on a witness in jail and evidence of a subsequent assault on that same witness in jail the following day; (2) the prosecution committed

misconduct by vouching for two witnesses during closing argument; (3) when combined, the aforementioned errors resulted in a cumulative prejudicial effect requiring reversal of the judgment; and (4) the minute order and abstract of judgment must be modified to accurately reflect the court's oral pronouncement of judgment. We agree that the minute order and abstract must be modified and will affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On December 26, 2006, Maurice Milton, April Hocker, and defendant were riding around in a car driven by Milton. Defendant asked Milton (who gave defendant some money to buy a gun) to take him to buy it. They stopped at a gas station. Defendant got out of the car, spoke with a person in another car for several minutes, then got back in the car and said he "got it." Later, they returned to defendant's house and spent the night.

The next day, defendant, Milton, and Hocker drove to an apartment complex on Del Paso Boulevard and hung out with a group of people. Defendant said he wanted to "hit a lick," meaning he wanted to rob somebody. They drove around and ended up in the Northgate area. Defendant said he was going to try to rob somebody. He got out of the car and walked over to another vehicle but returned several minutes later, telling Milton and Hocker, "I guess the guy didn't have any money."

Milton, Hocker, and defendant drove around looking for someone to rob. They pulled up to a cigarette store on Norwood Avenue owned by Gurpreet Bola's family. Bola was working behind

the counter. Two of Bola's regular customers were in the store: Ramneel Lal and Rajneel Sharma. Lal had a bag of marijuana in his hand.

Shortly thereafter, defendant entered the store. Milton, knowing defendant was going to try to rob someone, circled the car around and pulled up behind the store. Defendant asked Lal and Sharma if they "had any," meaning he was looking to buy some marijuana. When defendant said he did not like the way Lal's marijuana looked, Sharma said he had better quality marijuana but it was going to cost more. Defendant said, "Yeah, okay. Bring it on." He also said, "I'm getting late. I am going to Reno . . . can you hurry it up. I got to go somewhere. I got to go to Reno." Sharma and defendant left the store. Lal went to his car and waited for Sharma.

Defendant got back in Milton's car and said he recognized Sharma from jail and was going to steal "weed" from him. He used his cell phone to call Sharma, who told him he "had to go get the weed."[1] Defendant got out of the car again, carrying the gun, and walked around to the side of the building. Milton and Hocker, who recognized Sharma as someone she knew from junior high, waited in the car with the engine running. After several minutes, they heard gunshots and saw Sharma run from behind the

---

[1] Sharma's cell phone records reflected two calls from defendant that afternoon around the time of the shooting. There were no calls from Sharma to defendant.

store. He was bleeding and throwing up blood. Sharma pointed a gun at them but did not shoot. Milton drove away.

Meanwhile, as Lal waited for Sharma in his car, he heard gunshots and then saw defendant running and yelling, "'Oh, they are shooting. They're shooting.'" Defendant was holding himself as if he had been shot. Lal drove around looking for Sharma and tried to reach him on his cell phone. He eventually found Sharma on the ground not breathing and told Bola to call the police.

When police arrived, they found a .38-caliber semiautomatic pistol near Sharma's body. One of the crime scene investigators noticed a "fire case jammed in the ejection port of the .38 pistol." Sharma died of a gunshot wound to the chest. Forensics determined the shot that killed him was fired from close range.

As Milton and Hocker drove away, they saw defendant running down the street holding his shoulder. They picked him up and asked what happened. Defendant said he was trying to rob Sharma and "the guy pulled out on him" (meaning he pulled out a gun) so defendant shot him. Defendant was holding a baggie of marijuana that he took from the victim. Defendant was also shot. Milton offered to take him to the hospital but defendant refused and instead instructed Milton to take him to his mother's house in Oak Park.

When they arrived at the house, defendant told his mother and others at the house that he went to sell some marijuana and "the guy tried to rob him." While several people tended to his

wound, defendant instructed Milton to retrieve the baggie of marijuana from the car.

A few hours later, defendant, Milton, and Hocker drove to an apartment complex off Del Paso to hang out with some people. When people there started talking about a news report that someone had been shot, they left and went to defendant's uncle's house. There, they saw a news report confirming that Sharma died. Defendant appeared to be shocked and nervous when he heard the news. He went into another room to talk to his uncle. Defendant later described to Milton and Hocker the details of the incident, explaining that he tried to take the marijuana from the victim, telling the victim to "tear it off" (meaning give him the marijuana) and the victim "pulled out on him" (meaning he pulled out a gun) and shot him. Defendant demonstrated what happened, holding his hand up as if he had his gun out when he tried to rob the victim. At some point thereafter, Milton saw defendant pull the gun out from his waistband and place it under a bed.

Later that evening, defendant talked to his sister about the shooting. He told her he shot the victim when the victim tried to rob him.

The next morning, defendant's mother and sister tried to convince defendant to go to the hospital. Defendant reiterated his story that he shot the victim because the victim tried to rob him and told his mother that "he didn't mean to kill anybody, but like when -- when you rob somebody, they are supposed to give you their money." Defendant later admitted he

could not turn himself in because he had tried to rob the victim. Defendant's mother and uncle tried to convince defendant to turn himself in, despite his sister's advice not to because he could not claim self-defense. They discussed that defendant should stick to the story that he was trying to sell the victim marijuana and he shot the victim because the victim tried to rob him. Defendant's sister said he needed to get rid of the gun, so defendant gave it to her and she left.

Shortly thereafter, defendant's mother told defendant he needed to leave because his uncle was calling the police. Defendant left with Milton and Hocker. Milton dropped defendant off at Trader Joe's on Folsom Boulevard, then left town with Hocker.

Defendant was eventually arrested. During the booking process, the officers discussed the fact that defendant was getting booked on a violation of probation. After hearing that, defendant asked, "'They're not charging me with murder because I got shot, huh?'"

Defendant was charged with murder, second degree robbery, and felon in possession of a firearm. It was also alleged that defendant committed the murder while engaged in the commission of the robbery and that defendant personally and intentionally discharged a firearm during commission of the robbery and the murder.

After defendant's arrest, Milton received a telephone call from defendant's sister, who instructed him that if the police called, he should tell them defendant tried to sell the victim

marijuana but defendant ended up shooting the victim when the victim tried to rob him. Milton agreed to lie to the police. He instructed Hocker to tell police only that they were riding around with defendant, they dropped him off in front of the cigarette store, defendant came back to the car, they let defendant off at the store a second time, then they heard gunshots and drove off.

The next day, Milton spoke with detectives at the police station. Milton lied, telling them the story defendant originally told his mother as agreed.

Several months later, detectives interviewed Milton a second time at the police station.[2] During that second interview, Milton told police defendant tried to rob the victim. He did not, however, tell police about taking defendant to get the gun nor did he confess some of the other details of the incident.

Hocker was interviewed by an investigator for the prosecution several months after the crime. During that interview, Hocker provided some of the details about the crime but omitted many others.

Hocker and Milton both testified at the preliminary hearing. Hocker later admitted at trial that she did not answer all of the questions at the preliminary hearing to the best of her ability because she was still trying to stick to the story

---

[2] Both interviews were conducted without a grant of immunity for Milton.

Milton told her to tell while at the same time trying to tell the truth.[3] Hocker gave a final statement prior to trial and, for the first time, was truthful about all of the facts and details, figuring that if she told the truth, it "would be just way easier and make things a lot better."

Milton testified at trial after receiving a grant of immunity by the People. He admitted having lied under oath at the preliminary hearing. Hocker also testified under immunity and admitted having lied under oath at the preliminary hearing but stated that her trial testimony was truthful and she was not purposefully leaving out any facts or details. She testified that she lied previously because Milton told her to.

On the first day of trial, Milton testified regarding an incident that occurred that morning while he was in a holding cell waiting to testify. There were approximately 20 to 25 other people in the cell with him. Defendant was in a cell directly across from him. Milton heard defendant talking about the case. At first, defendant did not appear to notice Milton. However, once defendant saw Milton, he told the other inmates in the holding cell that Milton was going to testify in the case, calling Milton a "snitch." Defendant said Milton was "stupid for doing it" and bragged that he was "going to beat it [the case] because he got a bullet in him." He told Milton he knew

---

[3] Hocker said she prostituted for Milton, who was her pimp, for approximately six months prior to the crime and a number of months thereafter. She testified that Milton had control over her and occasionally yelled at her and beat her up.

where Milton's mom, baby daughter and baby's mother lived, making Milton feel "uncomfortable." Fearing for his safety, Milton denied that he was going to testify.

At the start of the second day of trial, outside the presence of the jury, the court and counsel discussed the fact that Milton had been assaulted in jail that morning. Milton had scratches on his face.

Shortly after trial resumed, the court interrupted Milton's testimony and, outside the presence of the jury, stated as follows: "The reason I stopped the proceedings is this morning I've been -- I've been evaluating the defendant's[4] demeanor, and I concluded that his demeanor was somewhat different this morning than yesterday morning, and so I want to address this issue one way or the other right now, because I think it's fair quite candidly to the prosecution and the defense. [¶] The objection articulated at sidebar was relevance. Well, it's clearly relevant. This assault is relevant because it explains fear and impact on Mr. Milton, so that objection has no merit, but I assume that what Mr. Warden's [defense counsel] real argument is [Evidence Code section] 352, and obviously, Mr. Warden, I'm not foreclosing you to speak to the issue of relevance either, but it seems to be that issue is more credence [*sic*]."

---

4 The court mistakenly referred to Milton as the defendant, but later corrected itself.

The court ultimately concluded as follows: "It has -- in the Court's mind significant probative value. The gentleman alleges that he was assaulted by three people in the cafeteria. He has minor but observable injuries consistent with that. As the Court follows the incident of yesterday morning where he alleges he was threatened and more important probably in this context he was brought to the attention of a large number of people in the holding cell that he was quote, unquote testifying against the defendant in a snitch like fashion. [¶] . . . [¶] The relevancy here seems to me to be the fear that this gentlemen [*sic*] may well be testifying under as a result of this assault which occurred -- was it this morning or late yesterday afternoon? [¶] . . . [¶] This morning. The Court notes, for example, in his demeanor he is quieter and the answers that he's giving is [*sic*] more hesitant and tentative at times than he was yesterday. It may well just be the questions, but the first part of it was noticeable, even striking to me. This is the first part of his testimony here this morning. [¶] The [Evidence Code section] 352 argument -- there is [*sic*] really two of them. Mr. Warden made one. Let me address them both because I think the second one not made actually is of more concern. The first one is he wants to cross-examine the witness after he's had that discovery, and he'll have that right -- I will keep this witness on call, and if there is a reason as a result of the discovery of more information about this incident, then of course he can reopen his cross-examination. That really from the Court's mind is comparatively minor. [¶] The second

and more difficult one which was not argued by Mr. Warden, but which is in my mind is the inference that the defendant was directly involved in some way in arranging the attack. This is more than the stated threats that were made or the notice to the people in the holding cell. The inference would be somehow or other that he put three folks [who] assaulted -- allegedly assaulted Mr. Milton up to their action, asked them to do it. [¶] First, I have no evidence to support that that's the case. The type of question that the prosecution asked originally that the defense objected to and I sustained would open that kind of issue up, and you're specifically foreclosed from doing that. There is no evidence that he has communicated with these three folks [who] initiated the assault, and in the absence of that evidence, you can't ask questions asking in any way speculation about what occurred. The assault speaks for itself, and there is no evidence that the defendant was specifically involved in the sense of arranging the assault to occur. [¶] The Court recognizes, however, there is nevertheless even with those restrictions which are only logical from the Court's perspective on the prosecution, there is the risk that this inference enters the jurors as one a possibility, and the Court may even, depending on how this issue plays out, be sympathetic to an admonition advising them that there is no evidence that [the defendant] was involved in, for example, soliciting or in any other way directly engaging in conduct that caused the assault. I will evaluate that request if it's made and the state of the evidence at that time. Nevertheless, there is some prejudicial

impact there. I think it's real. [¶] But the probative value here is -- of this witness is extremely important. He's one of two witnesses plus some damning admissions that the defendant also makes at the time right to the robbery and to understand the totality of the circumstances under which he is testifying including the immunity agreement which I'm sure Mr. Warden will dwell on properly at some length seems to me to be an extraordinary relevant factor in evaluating his testimony particularly so given that his demeanor this morning which, of course, caused me to interrupt the proceedings as I did. [¶] The bottom line is the probative value here is not outweighed by the prejudicial impact, either the delay in the cross-examination opportunity with regard to discovery that may come forth with regard to this incident or moreover the improper incident -- inference that the defendant directly cause[d] the the [*sic*] attack to occur. As a result, the defense objection is overruled. I will allow this issue to be raised by the prosecution."

Defense counsel objected again, arguing that Milton's testimony the day prior was quiet and tentative, possibly "a result of other issues such as his credibility that he knows that he is not telling the truth about matters." The court responded that Milton "did speak quietly yesterday and at times hesitantly. I thought it was of a different character and extent this morning." Defense counsel requested that the jury be admonished on that point, to which the court replied, "[i]n that regard, I would ask you, Mr. Warden, to prepare what you

think would be an appropriate written admonition." Defense counsel did not provide an admonition.

Milton testified that on the morning of the second day of trial, he was assaulted in jail. Milton noticed another inmate walking away from Milton's cell carrying a box full of commissary items Milton had just purchased. Milton "went to get it [the box]" back. As Milton walked toward the inmate, he was struck in the back of the head from behind by two other inmates. Milton's attackers told him they knew what was going on and said he was snitching by testifying in a case. The court admonished the jury not to consider the statements made by the attackers for their truth, but rather "just for impact, if any, on his [Milton's] mind." Milton testified that the assault caused him to be uncomfortable as he testified; nonetheless, he confirmed that he would still testify truthfully. Thereafter, he resumed his testimony regarding the events surrounding the crimes.

The jury found defendant guilty on all three counts and found the enhancements true. The court sentenced defendant to 25 years to life plus life in prison without the possibility of parole. The court ordered defendant to pay a $10,000 restitution fine, a $10,000 parole revocation fine stayed pending successful completion of parole, restitution to the victim in an amount to be determined and "all of the other fines and fees as set forth."

Defendant filed a timely notice of appeal.

DISCUSSION

I

Threats By Defendant And Assault On Milton

Defendant claims it was error for the trial court to admit testimony regarding threats by defendant on Milton while in jail the morning of trial and testimony regarding an assault by three inmates on Milton the following morning. We do not agree.

Defendant concedes that evidence of the first incident -- defendant's threat on Milton -- was relevant to the issue of consciousness of guilt under *People v. Hannon* (1977) 19 Cal.3d 588. However, he contends what little probative value the evidence of this incident may have had was substantially outweighed by its undue prejudice.

As to the second incident-- the assault on Milton -- defendant contends that although the evidence of the attack may have had minimal "pretextual" probative value of Milton's state of mind, it was "highly prejudicial" and should not have been admitted pursuant to *People v. Warren* (1988) 45 Cal.3d 471, because there was no evidence defendant was present when the second incident occurred, and there was no evidence he either authorized that assault or had any knowledge of it. As such, he argues, that evidence was relevant only as to Milton's state of mind, but was nevertheless used to show consciousness of guilt by linking defendant to the assault.

A trial court's decision to admit evidence under Evidence Code section 352 is reviewed for abuse of discretion "and will not be disturbed except on a showing the trial court exercised

its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see also *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.) The erroneous admission of evidence offends due process if it is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

At the time the evidence of the threat on Milton was presented, the court tested the proposed testimony under Evidence Code section 352 and concluded any potential prejudice was outweighed by the probative value of the evidence. The second incident had not yet occurred, and therefore could not have been factored into the balancing exercise undertaken by the court.

Regarding the attack on Milton, the court discussed with counsel, outside the presence of the jury, that it had stopped the proceedings due to a "noticeable, even striking" difference in Milton's demeanor on the stand, as well as visible marks on his face from the assault. The court noted specifically that there was no evidence to support an inference that defendant was in any way responsible for the assault. The court concluded the probative value the assault on Milton had on his willingness to testify was not outweighed by any prejudicial effect. As defendant repeatedly makes clear, Milton is a key prosecution witness. His testimony provides evidence that defendant intended to and did commit the robbery that led to the murder of Sharma. Any attempt to interfere with or limit his ability to

testify freely and truthfully is probative. Defendant had the opportunity to address that issue on cross-examination. He made full use of that opportunity, including questioning Milton extensively regarding inconsistencies in his testimony and his motives for testifying in a manner contradictory to prior statements and testimony given under oath.

Defendant claims the prosecution "actively elicited" testimony linking defendant to the assault, seeking testimony regarding prior problems between Milton and his attackers, and asking whether the attackers "said why they were assaulting Milton." Not so. The prosecutor, again outside the presence of the jury, sought to ask Milton whether he had any prior unsettled disputes with any of the attackers. The court overruled defense counsel's objection that such testimony would be speculative, finding it would be Milton's "direct testimony he didn't have prior problems with him." Despite that ruling, the question was never asked, nor were there any questions linking defendant to the assault. Finally, contrary to defendant's claim, there is no evidence in the record that the prosecution ever asked, or sought to ask, *why* the attackers assaulted Milton. Instead, the questions focused on whether the assault affected Milton's willingness to testify truthfully.

Defendant urges that the prosecutor, in closing and rebuttal argument, repeatedly referenced both incidents, linking the fact that defendant called Milton a "snitch" to defendant's consciousness of guilt. Defendant is mistaken. During rebuttal, the prosecutor stated as follows: "Did [defendant]

try to discourage anyone from testifying? What happened the first day of trial, when he's in the tank with Maurice Milton and he said, 'That's the snitch right there'? I got him on paper, making that statement in front of all those people, calling Maurice Milton out as a snitch. What effect do you think that had had on that witness, having to come here and do that? [¶] And if you go back and think about Maurice Milton's testimony, he appeared a little bit different the second day than he did the first day. And it was because of that: Being discouraged, being called a snitch, getting beat up. [¶] Now, it's not the People's position that the defendant had anyone beat up Maurice Milton. He is not connected to that, nor is there any proof of that. But the idea that you're calling someone a snitch, that makes him a target in jail, and that's why he got beat up the very next day. That fact, that discouragement is something that you can consider. It's another fact. It's another thing to put on the plate when you're trying to figure out what happened."

The prosecutor said nothing about defendant's consciousness of guilt, telling the jury specifically that there is no evidence to link defendant to the assault. Instead, the prosecutor suggests that being called a "snitch" and getting beat up caused Milton to become even more tentative and hesitant than he was the day prior, and tells the jury it may consider that in assessing Milton as a witness.

Defendant argues "the prejudice stemming from the threat in the holding tank was exacerbated by the prejudice arising from

the assault," speculating that the jury would have drawn an improper connection between the two events based on common sense, Milton's direct examination, the prosecution's closing argument, and the lack of a limiting instruction. As we have already discussed at length in this opinion, the prosecution's direct examination of Milton and its closing and rebuttal statements focus on the impact both incidents had on Milton's willingness and ability to testify truthfully at trial. Defendant tested Milton's credibility in cross-examination and addressed it at length during closing statements.

As for the lack of a limiting instruction, defendant elected not to request one despite the court's express invitation to do so. A defendant forfeits his claim that the trial court's comments were erroneous if he fails to request a limiting instruction. (*People v. Ledesma* (2006) 39 Cal.4th 641, 698.) Here, the court gave defense counsel an opportunity to provide the language with which to instruct the jury so as to limit the use made of the evidence. No such instruction was provided. Defendant has therefore forfeited that claim on appeal.

Anticipating this conclusion, defendant claims the failure to request a limiting instruction was the result of ineffective assistance of counsel. To prevail on this point, defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674, 694]; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) If the

record fails to show why counsel acted or failed to act as he did, the contention fails unless counsel failed to provide an explanation upon request or there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268; *People v. Pope* (1979) 23 Cal.3d 412, 425.)

Defendant argues there can be no tactical reason for counsel's failure to request the limiting instruction to ensure the jury did not consider Milton's testimony regarding the assault to show defendant's consciousness of guilt or that defendant was, in any way, responsible for the assault. He argues his counsel's attempt to exclude that evidence shows counsel believed it to be damaging to defendant's case. The record, however, does not divulge why counsel did not request a limiting instruction. One obvious tactical reason is that defense counsel did not want to bring more attention to the testimony than necessary or plant the idea that defendant might be linked to the assault in the minds of the jurors. Moreover, as the People point out, the jury was instructed regarding consciousness of guilt with CALCRIM No. 371, which provides that evidence of discouraging a witness may be considered to find consciousness of guilt only if the defendant was involved. We conclude defendant has failed to show ineffective assistance of counsel.

The court did not abuse its discretion in overruling defendant's objections to Milton's testimony regarding either the threat or the assault.

II

Prosecutorial Misconduct

Defendant contends the prosecutor's comments during rebuttal argument concerning the testimony of Milton and Hocker given under the protection of an immunity agreement constituted prosecutorial misconduct.

A portion of the prosecution's rebuttal argument went as follows:

"MR. WASHINGTON [the prosecutor]: There's actually something that I wanted to point out about immunity itself, just because we've talked about immunity, and I'm thinking maybe it's not so clear what immunity is. But here's something that's important to understand. [¶] With April Hocker and Maurice Milton -- for them to come in here and testify in court, to tell you the truth, to come in and give their testimony before you so you could see the whole picture, the People were put in a position where we had to make a choice to give them immunity or not. And that's because the testimony that they give, the truth about what happened that day is that they in some way are involved in this. The fact that --

"MR. WARDEN [defense counsel]: Objection, your Honor.

"THE COURT: Overruled.

"MR. WASHINGTON: The fact that Maurice Milton knows that [defendant] wants to do a robbery and he's driving him around, the fact that the defendant tells him, I'm about to go rob a guy for his weed, and he sits there in the car waiting -- I mean, he's the driver. But he can't come in here and tell you that

testimony if he's not given immunity. [¶] The fact that April Hocker, who really didn't have much to do with this case but the fact that she was willing that first time to do exactly what Maurice said and tell the police a total lie that very first interview, that's kind of making her an accessory. [¶] So for them to come in and be able to --

"MR. WARDEN: Your Honor, I object, Balke.

"THE COURT: I am going to ask you to approach on this one. [The discussion at bench was not recorded.]

"THE COURT: I am going to overrule the objection. There's no Balke here. I'm going to strike the reference to her being an accessory. There hasn't been evidence with regard to what that word means in this context. [¶] I'll ask you to move forward.

"MR. WASHINGTON: Thank you. [¶] The fact that April Hocker lied to the police puts her in her own -- she has her own issues to deal with. So to be able to have them take the stand and tell the truth and -- the full truth, the total truth, everything that they told you, a lot of that stuff implicated them. A lot of that stuff actually put them in a negative light. The People had to make a choice whether to offer immunity or not. And the choice the People made were [*sic*] to give them immunity because we felt it was more --

"MR. WARDEN: Objection, your Honor.

"THE COURT: Excuse me; I am going to sustain right at this point.

"MR. WASHINGTON: Okay. The reason that they were given immunity is --

"MR. WARDEN: Objection, your Honor.

"THE COURT: I am going to ask you to approach. [The discussion at bench was not recorded.]"

The prosecutor then moved on to another point in his argument.

Defendant claims the prosecutor's statements vouched for the veracity of Milton and Hocker by insinuating he (the prosecutor) had personal knowledge not known to the jury and by placing the prestige of the district attorney's office behind those two witnesses, thus violating defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. We disagree.

"[A] prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses. [Citations.] It is misconduct, however, to suggest to the jury in arguing the veracity of a witness that the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt. The danger in such remarks is that the jury will believe that inculpatory evidence, known only to the prosecution, has been withheld from them. [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Improper vouching involves an attempt to bolster a witness by reference to facts outside the record. (*People v. Huggins*

(2006) 38 Cal.4th 175, 206-207.) Thus, it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office. (*Ibid.*) Here, however, the prosecutor did not vouch for Milton's or Hocker's veracity or credibility based on facts outside the record. Contrary to defendant's claims, the prosecutor makes no mention of any outside-the-record knowledge of either witness's truthfulness and there was no suggestion that he was privy to any inside information regarding the offer of immunity to either witness. The prosecutor did not voice any opinion about either witness's credibility. Instead, he explained that in order for Milton and Hocker to give the version of events they gave during trial, both would implicate themselves in one way or another thus necessitating the immunity agreements. Moreover, the jury was later instructed that statements by counsel are not evidence and that it was to decide all questions of fact from evidence received in the trial and not from any other source and to base its decision on the facts and the law proved from the evidence presented. Defense counsel's objection based on improper argument was properly overruled.

There was no error.

III

Cumulative Error

Defendant contends the errors discussed in parts I and II of this opinion, combined, fortify the testimony of Milton and Hocker, the result of which is undue prejudice to defendant.

Given our disposition of defendant's other claims, we reject this claim.

IV

Fees And Fines

Having read and considered the probation report, the court ordered defendant to pay a $10,000 restitution fine, a $10,000 parole revocation fine (stayed pending successful completion of parole), restitution to the victim in an amount to be determined and "all of the other fines and fees as set forth."

Defendant contends the court's oral pronouncement of judgment did not include various items reflected on both the court's minute order and the abstract of judgment, namely probation report costs of $702, a $20 court security surcharge, a $213.37[5] main jail booking fee, or a $23.50 main jail classification fee. As such, defendant contends those items must be stricken or, in the alternative, the order and abstract must be modified to include all but the probation report cost, which was not properly included in the fees and fines recommended in the probation report.

Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

---

[5] The $213.87 main jail booking fee reflected in the abstract appears to be a typographical error.

Here, the trial court made clear that it was referring to the probation report in pronouncing judgment. The report recommends a $10,000 restitution fine, a $10,000 parole revocation fine (stayed), restitution to the victim to be determined, a $20 court security fee, a $213.37 main jail booking fee, and a $23.50 main jail classification fee. We infer that the court was referring to those fees and fines when it ordered defendant to pay "all of the other fines and fees as set forth." We therefore agree that the abstract of judgment correctly includes those fees but note that the $213.87 main jail booking fee reflected on the abstract must be corrected to reflect a fee of $213.37, as recommended in the probation report and reflected in the court's minute order.

We also agree, as do the People, that the $702 probation report cost must be stricken. The fee was not listed in the probation report as one of the recommended fees and fines. Instead, it was included at the end of the report *after* the author's signature. Moreover, that fee was neither expressly nor impliedly included by the trial court in its oral pronouncement of judgment. For these reasons, the $702 probation report cost must be stricken.

DISPOSITION

The trial court shall modify the minute order and abstract of judgment, striking from both the $702 probation report cost, and modifying the abstract to reflect a main jail booking fee of $213.37. The court shall forward the amended abstract to the

Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.